Supreme Court, U.S.
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No. 98-124

In The

Supreme Court of the United States

October Term, 1997

BURBANK-GLENDALE-PASADENA
AIRPORT AUTHORITY,
A Joint Powers Agency,

Petitioner,

v.

CITY OF BURBANK,
A Municipal Corporation,

JAMES W. VAN LOBEN SELS, in his official capacity as Director of the Department of Transportation of the State of California,

STATE OF CALIFORNIA,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

STATE OF CALIFORNIA'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a political subdivision of a state may maintain an action in federal court challenging the Constitutionality of a statute of its sovereign State, where the political subdivision has litigated the identical issue in state court, where the matter may be resolved upon independent state law grounds, and where the matter is on appeal in state court.

PARTIES TO THE PROCEEDINGS BELOW

Petitioner Burbank-Glendale-Pasadena Airport Authority was the Plaintiff in the United States District Court for the Central District of California, and was the Appellant in the United States Circuit Court of Appeals for the Ninth Circuit.

Respondents City of Burbank and James van Loben Sels were defendants in the United States District Court for the Central District of California, and were Appellees in the United States Circuit Court of Appeals for the Ninth Circuit.

Respondent State of California intervened as a defendant in the United States District Court for the Central District of California, and was an Appellee in the United States Circuit Court of Appeals for the Ninth Circuit.

Herein, all State Respondents respond together, as "the State," or "State Respondents."

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OPINIONS BELOW

The Petition for Writ of Certiorari accurately reflects the opinion of the United States Circuit Court of Appeals for the Ninth Circuit, and of the District Court for the Central District of California, which are set forth in Appendices A and B, respectively, to the Petition. The order of the Ninth Circuit denying Petitioner's petition for rehearing and denying Petitioner's suggestion for rehearing *en banc* is set forth in Appendix C to the Petition.

JURISDICTIONAL STATEMENT

State Respondents agree with Petitioner's statement of jurisdiction.

STATUTORY PROVISIONS INVOLVED

The Petition correctly states that this case involves the Supremacy Clause, U.S. Const., art. VI, cl.2. This case also involves California Public Utilities Code, Section 21661.6, which provides:

> (a) Prior to the acquisition of land by any political subdivision for the purpose of expanding or enlarging an existing publicly owned airport, the acquiring entity shall submit a plan of such expansion or enlargement to the board of supervisors of the county, or the city council of the city, in which the property proposed to be acquired is located.

(b) The plan shall show in detail the airport-related uses and other uses proposed for the property to be acquired.

(c) The board of supervisors or the city council, as the case may be, shall, upon notice, conduct a public hearing on such plan, and shall thereafter approve or disapprove the plan.

(d) Upon approval of the plan, the proposed acquisition of the property may begin.

(e) The use of property so acquired shall thereafter conform to the approved plan, and any variance from such plan, or changes proposed therein, shall first be approved by the appropriate board of supervisors or city council after a public hearing on the subject of the variance or plan change.

(f) The requirements of this section are in addition to any other requirements of law relating to construction or expansion of airports.

STATEMENT OF THE CASE

Petitioner is a joint powers agency, a political subdivision of the State of California formed pursuant to specific authorization by the California Government Code (Cal. Govt. Code § 6546.1) and a joint powers agreement entered into by the three constituent cities pursuant to that specific authorization. Petitioner owns and operates a single airport, one of the approximately 260 airports that hold permits from the California Department of Transportation.

The State of California closely regulates all areas of airport operation not regulated by the Federal Aviation Administration. One such area of regulation is the acquisition of property for the purpose of expanding a publicly owned airport. For over a quarter of a century, California law has required that before a publicly owned airport can acquire land for expansion of that airport, it must obtain the approval of the city or county where the expansion land is located. (Cal. Pub. Util. Code § 21661.6.) It is this state statute that Petitioner claims is preempted by federal law.

Petitioner seeks to acquire land to build a relocated and vastly expanded passenger terminal for the Burbank Airport. Petitioner correctly represents to the Court that it has satisfied the federal requirements for this proposed project (Petition, p. 5, note 3). However, it has openly refused to comply with state law requirements, in that it has attempted to acquire land for its proposed expanded terminal without obtaining the consent of Respondent City of Burbank, within whose jurisdiction the land lies and upon whose citizens the impacts of the expanded terminal would be visited.

While Respondent City of Burbank was considering the proposed land acquisition, Petitioner filed the case below in the District Court for the Central District of California, seeking a declaration that the Public Utilities Code section in question is preempted by federal aviation law and regulations, pursuant to the Supremacy Clause, U.S. Const., art. VI, cl.2. It also alleged violation of the Commerce Clause, U.S. Const., art. I, § 8, and the Due Process Clause, U.S. Const., amend. XIV, § 1.

Petitioner initially sued only Respondent City of Burbank, then added Respondent James van Loben Sels, in his capacity as Director of the California Department of Transportation. The State of California moved for and was granted permission to intervene to defend the constitutionality of its statute.[1]

The District Court dismissed the suit on the ground that Petitioner lacked standing to make the constitutional challenge in federal court to the statute of its sovereign State, citing *City of South Lake Tahoe* v. *California Tahoe Regional Planning Agency*, 625 F.2d 231 (9th Cir.), *cert. denied*, 449 U.S. 1039 (1980).[2] The Ninth Circuit affirmed,[3] and later denied Petitioner's suggestion for rehearing *en banc*.[4]

Notwithstanding the decision of the District Court, and while its appeal was pending in the Ninth Circuit, Petitioner aggressively pursued its attempt to acquire the expansion land. In response, Respondent City of Burbank filed suit in state court to enjoin Petitioner from acquiring the expansion land until Petitioner complied with Public

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[1] Petitioner asserts that the State of California has waived its immunity from suit under the Eleventh Amendment. However, in its oral motion to intervene, the State expressly indicated that it was *not* waiving Eleventh Amendment immunity as to any monetary claims made against the State treasury; rather, the State's intervention was limited to defense of the constitutionality of the state statute, and its waiver of immunity was limited to those equitable and declaratory relief claims in the complaint.

[2] Decision found in Appendix B to Petition.

[3] Decision found in Appendix A to Petition.

[4] Order found in Appendix C to Petition.

Utilities Code section 21661.6. Respondent City of Burbank sought a declaration of the validity of that statute.[5] Respondent State of California intervened into this state court action as plaintiffs for the purpose of enforcing the state statute and seeking its validation. Petitioner cross-complained to allege, *inter alia*, that the state statute was preempted by federal aviation laws and regulations. This was, of course, the identical issue – phrased in substantially identical words – raised by Petitioner in its federal action against Respondents in the previously dismissed federal action.

The state court heard cross-motions for summary adjudication of issues in two stages. It first heard cross-motions by the parties on the issue of federal preemption of the state statute by federal law pursuant to the Supremacy Clause. The state trial court resolved these issues against Petitioner, ruling that Public Utilities Code section 21661.6 was not preempted by federal law or regulations.[6] Second, the state trial court heard cross-motions on issues of state law, including the question of whether Respondent City of Burbank was legally able to delegate, and in fact had delegated, to Petitioner all of its rights under state law to review acquisition of property for expansion of the Burbank Airport, through the act of entering and later amending the joint powers agreement that created Petitioner. The state trial court ruled for Petitioner on the delegation issue, entered a judgment in

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[5] As indicated in the Petition (p. A-9), the Ninth Circuit took judicial notice of the state action.

[6] This decision is found in Appendix A to Respondent City of Burbank's Request for Judicial Notice.

favor of Petitioner, and dismissed Respondents' case.[7] Respondents City of Burbank and State of California have appealed this state court judgment, and the case is currently pending in the California Court of Appeal for the Second Appellate District.[8]

ARGUMENT IN OPPOSITION TO PETITION

I. REVIEW BY THE COURT IS UNNECESSARY SINCE PETITIONER HAS ALREADY INVOKED THE REVIEW OF THIS QUESTION BY THE STATE COURTS, WHICH ARE FULLY COMPETENT TO ADJUDICATE THE QUESTION AND ARE, IN FACT, DOING SO.

The Petition for Certiorari is essentially a request to the Court that it provide a solution where there is no problem. The Petition implies that Petitioner has *no* forum in which it can adjudicate its preemption claims.[9] However, Petitioner not only has a perfectly adequate forum in which to litigate its preemption claims, Petitioner has done so and has been extremely successful at it. After the U.S. District Court dismissed Petitioner's

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[7] This decision is found in Exhibit B to Respondent City of Burbank's Request for Judicial Notice.

[8] *City of Burbank, et al.* v. *Burbank-Glendale-Pasadena Airport Authority*, 2d Civil Nos. B123632.

[9] *See*, Petition at p. 7, emphasis in original: "[The rule that a political subdivision may not challenge the constitutionality of a state statute in federal court] has been followed in both federal and state courts to prohibit political subdivisions from mounting constitutional challenges to state action in *any* forum."

federal preemption challenge to the state statute, Petitioner pursued the exact same challenge through a cross-complaint in state court. Petitioner fully litigated its preemption claims in the state trial court and is currently continuing to do so on appeal. Accordingly, Petitioner here is asking for a second bite at the jurisdictional apple. This stratagem represents an undue burden on limited judicial resources.

It is axiomatic that state courts are fully competent to hear and adjudicate claims based upon federal law. *Tafflin* v. *Levitt*, 493 U.S. 460, 458 (1990) ("[W]e have consistently held that state courts have inherent authority, and are thus presumptively competent, to adjudicate claims arising under the laws of the United States.") Thus, the state court process in which all the parties here, including Petitioner, are deeply involved, can be trusted by the Court to fully and competently adjudicate Petitioner's federal claims.

Even if there were any doubt, this Court retains the ultimate authority over preemption claims,[10] and Petitioner can seek review by the Court of any ultimate state law decision if it is dissatisfied with the result.

A compelling case can be made that the federal courts should exercise their discretion to abstain from adjudicating the preemption claims advanced by Petitioner during the pendency of the state court litigation. This legal dispute involves issues of the interpretation and applicability of a state statute that has not yet been

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[10] 28 U.S.C. § 1257.

considered by any California appellate court. The resolution of these state law issues may altogether avoid or at least narrow federal constitutional questions. The existence of such threshold state law issues suggests the appropriateness of abstention under *Railroad Comm'n of Texas* v. *Pullman Co.*, 312 U.S. 496 (1941). In addition, the state case is already well-developed and very far along, warranting abstention under the related abstention principles of *Colorado River Water Conservation Dist.* v. *United States*, 424 U.S. 800 (1976). *Colorado River* abstention would be appropriate, in order both to avoid the duplication of resources inherent in both a state and a federal court trying essentially identical claims, and to avoid an unseemly and unnecessary conflict between the state appellate decision in this already pending case and a federal court's decision in a remanded case. *Colorado River, supra*, 424 U.S. at 818.

Since Petitioner has a remedy in state court that it is actively – and, so far, successfully – pursuing, and since federal abstention is a fully appropriate outcome, it is difficult to understand the need for the Court's review at this time. Even Petitioner seems to recognize this: it makes the essentially abstract argument that political subdivisions should be able to challenge state statutes under the Supremacy Clause in federal court because otherwise federal "legislation and regulation may go unchecked even though expressly prohibited by the Constitution."[11] With all due respect, whatever may perhaps happen in some theoretical future case, no such concerns

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[11] Petition, p. 7.

are presented by *this* case. Petitioner can pursue its remedy in state court as it has quite ably done.

II. THE NINTH CIRCUIT CORRECTLY APPLIED COURT PRECEDENT IN DENYING STANDING TO PETITIONER

The Petition here is a frank invitation to the Court to overrule cases that have been vital precedent for a century. Petitioner does so based on its strained reading of several cases in which the Court has granted review where political subdivisions have challenged the constitutionality of statutes of their respective States. Petitioner reads these cases as *sub silentio* overruling the cases upon which the Ninth Circuit relied here, and in its earlier decision in the *South Lake Tahoe* case. Petitioner reasons that because the Court consented to review these cases, the Court precedents upon which *South Lake Tahoe* relies now lack vitality, and that it is time for the Court to renounce them.

But these venerable decisions of the Court are still very much alive. The cases upon which the Ninth Circuit relied in *South Lake Tahoe* are *Hunter* v. *Pittsburgh*, 207 U.S. 161 (1908), and *Trenton* v. *New Jersey*, 262 U.S. 182, 187 (1923), and their progeny. The latter cases define the relationship between a political subdivision and the State from which that political subdivision draws both its existence and whatever powers it may possess. The *Hunter* and *Trenton* line of cases hold that, because a political subdivision derives both its very existence and the entire scope of its powers from the discretionary grant of its sovereign State, it "has no privileges or immunities under

the federal constitution which it may invoke in opposition to the will of its creator." *Williams* v. *Baltimore*, 289 U.S. 36, 40 (1933). As *Hunter* holds:

> Municipal corporations are political subdivisions of the State, created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them. . . . The number, nature and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the State."

Hunter, supra, 207 U.S. 161 at 178. As this Court has recognized, it is a basic tenet of federalism that States be allowed to organize their state and local government systems as they see fit. *Id.*

The Court, of course, can and will ultimately judge for itself whether it has overruled these cases, *sub silentio*, merely by agreeing to review the cases cited by Petitioner. However, the better view is that the Court has not so overruled them. The cases cited by Petitioner are *Board of Education* v. *Allen*, 392 U.S. 236 (1968), *Washington* v. *Seattle School District*, 458 U.S. 457 (1982), and *Lawrence County* v. *Lead-Deadwood School Dist.*, 469 U.S. 256 (1985). Petitioner's *sub silentio* argument implicitly concedes that *none* of these cases directly overruled the *Hunter-Trenton* line of cases, or their reasoning, based on the standing of the plaintiffs therein. Indeed, only *Lead-Deadwood* even *discussed* the *Hunter-Trenton* holdings, and that was in the dissent, implying that the Court did *not* reject those holdings by taking the *Lead-Deadwood* case for review.

More than that, in both the *Seattle School District* case and the *Allen*[12] case, there were plaintiffs (or defendants defending the statute involved) other than the political subdivisions, and the Court may well have bottomed its exercise of jurisdiction upon the uncontested standing of those other parties.[13] In any event, the fact that the Court did decide these cases on their merits does not imply any ruling whatsoever on the question of the standing of a political subdivision to sue its sovereign State.

The Court has long held that mere exercise of jurisdiction, without any express holding as to the propriety or foundation for such exercise, is not precedent for the existence of jurisdiction. *United States* v. *Los Angeles Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952) ("The effect of the omission [of the jurisdictional issue] was not there raised in briefs or argument nor discussed in the opinion of the Court. Therefore, the case is not a binding precedent on this point.") Under the *Tucker Truck* reasoning, the mere fact that the *Allen* and *Seattle School District* cases were decided by the Court would not constitute an overruling of the *Hunter-Trenton* cases, even if those cases had no

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[12] The Petition makes several references to a *Brown* case. (Pet., at pp. 9-11). State Respondents assume that this is an inadvertent error, and that the reference is intended to be to the *Allen* case.

[13] In *Seattle School District*, the Court's opinion points out that "[t]he United States and several community organizations intervened in support of the [School] District" in the case. *Seattle School District, supra*, 458 U.S. at 464. In *Allen*, there were private, individual defendants who intervened to defend the statute and were part of the proceedings at both the state court and the Supreme Court levels. *Allen, supra*, 392 U.S. at 240, note 4.

other parties upon whose presence and standing the Court could ground jurisdiction. *A fortiori*, it cannot constitute an overruling of the *Hunter-Trenton* cases where there were such parties, and there were independent sources of standing.[14]

The Court has not abandoned, *sub rosa* or *sub silentio*, the reasoning of the *Hunter-Trenton* cases that the powers of a local government flow from the State that created that local government, and that the local government remains subject to the supervening will of the State that created and empowered it. *Trenton, supra*, 262 U.S. at 187. A political subdivision such as Petitioner simply has no rights, privileges or immunities to assert against the sovereign State that authorized its creation, and it has no standing to challenge that State's laws on constitutional grounds in federal court.

III. THE PURPORTED CONFLICT IN THE CIRCUITS IS ONLY A DEBATE IN DICTA, NOT A CONTROVERSY THAT MERITS THE COURT'S ATTENTION OR ACTION.

Petitioner characterizes the federal circuits as hopelessly in conflict over the correct application of the

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[14] Nor does the *Lead-Deadwood* case support Petitioner's argument. *Lead-Deadwood* does not address the *Hunter-Trenton* standing issue, but merely rules on whether a particular claim was or was not a federal law claim for jurisdictional purposes. The fact that the majority opinion was adopted over a dissent that specifically argued that the *Hunter-Trenton* line of cases forbade deciding *Lead-Deadwood* further erodes Petitioner's argument that this case implicitly overruled a century's worth of Court precedent on this question.

Hunter-Trenton principles. While it is true that the circuits' opinions have discussed the issue from time to time, it has almost universally been in dicta. Rather than a raging and vital controversy, there has been more a spirit of academic debate. The precise question presented here, whether a political subdivision of a State may challenge state legislation in federal court under the Supremacy Clause, has *not* been the subject of disagreement in the circuits for nearly two decades.

The cases cited by Petitioners instead reveal a solid uniformity in their holdings. While they may, in dicta, question the current boundaries of the *Hunter-Trenton* rule, the circuits have had no difficulty in applying it, holding consistently that political subdivisions lack standing to bring various claims against their sovereign States.

Both the Sixth Circuit in *South Macomb Disposal Authority* v. *Township of Washington*, 790 F.2d 500 (6th Cir. 1986), and the Eleventh Circuit in *United States* v. *State of Alabama*, 791 F.2d 1450 (11th Cir. 1986), reaffirmed that political subdivisions lacked standing to bring actions under either the Due Process Clause or 42 U.S.C. § 1983 against other political subdivisions of their State or against the State itself, respectively.[15]

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[15] Petitioner's assertion that *South Macomb* "recognizes that the *Hunter* rule does not prohibit *all* constitutional challenges to state statutes by political subdivisions" (Pet., p. 12) is somewhat disingenuous. All that *South Macomb* recognized was that the *Fifth Circuit* had allowed a Supremacy Clause challenge by a political subdivision in *Rogers* v. *Brockette*, 588 F.2d 1057, *cert. denied*, 444 U.S. 827 (1979), see *South Macomb*, 790 F.2d at 504; the Sixth Circuit itself expressed no opinion on the issue.

In *United States* v. *State of Alabama*, 791 F.2d 1459 (11th Cir. 1986), the Eleventh Circuit followed the *Hunter-Trenton* principles, holding that "[Alabama State University], as a creature of the state, may not raise a Fourteenth Amendment claim under Section 1983." *Alabama, supra*, 791 F.2d at 1454-55.[16] The Third Circuit case cited by Petitioner, *Amata* v. *Wilentz*, 952 F.2d 742 (3d Cir. 1991), turns chiefly on its analysis of third party standing and not the *Hunter-Trenton* cases at all. In fact, the Third Circuit reaffirmed the importance of "federalism factors" regarding the reluctance of federal courts to provide a forum for political subdivisions to sue their own States, and rejected the standing of the county to sue a portion of the State judiciary over a First Amendment claim. Finally, the Fourth Circuit case of *School Board of City of Richmond* v. *Baliles*, 829 F.2d 1308 (4th Cir. 1987), does not discuss the *Hunter-Trenton* issues at all, beyond a mere citation to the *Board of Education* v. *Allen* case. *Baliles, supra*, 829 F.2d at 1311. Rather, the Fourth Circuit allowed the school board in that desegregation case to assert the derivative claims of black and white students in prosecuting the appeal after the original plaintiffs had left the case. *Id.*

Thus, the only real conflict among the Circuits that Petitioner can show is between the Ninth Circuit's *South Lake Tahoe* rule barring standing to political subdivisions, and the Fifth Circuit's holding in *Rogers* v. *Brockette* that allowed such a subdivision to maintain a Supremacy Clause challenge to State action. However, this Court was

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[16] In addition, in *Alabama*, as in *Seattle School District*, there were other plaintiffs whose standing was not challenged. *Alabama, supra*, 791 F.2d at 1454.

presented with that same inconsistency between the Ninth and Fifth Circuits when it was asked to review *South Lake Tahoe* and declined to do so. *City of South Lake Tahoe, et al.* v. *California Tahoe Regional Planning Agency, et al.*, 449 U.S. 1039 (1980). The Court did not consider that inconsistency to be worth reviewing at that time, and no conflict within the Circuits has presented itself since that time that is any more worthy of the Court's time and attention. This is not an issue that requires review.

CONCLUSION

For all the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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